No. 89-700

In the Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS CO.,
LIMITED PARTNERSHIP, PETITIONER

v.

SHURBERG BROADCASTING OF HARTFORD, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

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QUESTION PRESENTED

Whether the Federal Communications Commission's minority distress sale policy, which permits a limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms, violates the equal protection component of the fifth amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-112a) is reported at 876 F.2d 902. The memorandum opinion and order of the Federal Communications Commission (Pet. App. 113a-129a) is reported at 99 F.C.C.2d 1164 (1984).

JURISDICTION

The judgment of the court of appeals (Pet. App. 141a) was entered on March 31, 1989. The orders of the court of appeals denying rehearing and rehearing *en banc* (Pet. App. 143a, 155a) were entered on June 16, 1989. The petition for a writ of certiorari was filed on October 30, 1989. The petition was granted on January 8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Relevant portions of the Constitution of the United States, the Communications Act of 1934, as amended, 47 U.S.C. 151 *et seq.*, and other statutes are set forth at Pet. App. 161a-164a.

STATEMENT

A. Background

1. Development of FCC Minority Ownership Policies

a. *Early Recognition of the Need for Specific Minority Policies*

This case involves the FCC's minority distress sale policy, which provides incentives for existing licensees, in narrowly defined circumstances, to sell a radio or television station to a minority controlled buyer. This policy, adopted by the FCC in 1978, is one aspect of the agency's more general, and longstanding, efforts to increase diversity in radio and television programming generally by increasing diversity of ownership of broadcast stations.[1] The Commission has explained that it has been committed to the concept of diversity of control of broadcast stations because "diversification . . . is a public good in a free society, and is additionally desirable where a government licensing system limits access by the public to the use of radio and television facilities." *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965).

In the late 1960s, following the adoption of the Civil Rights Act of 1964 and the *Report of the National Advisory Commission on Civil Disorders* (1968) [hereafter *Kerner Comm'n Report*], the Commission began to focus its diversity-related concerns on the very small participation by minorities in the broadcasting industry. The Commission acted first in the area of employment by adopting regulations that sought to ensure that broadcast licensees did not discriminate against minorities in their employment practices. *See, e.g., Nondiscrimination Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969).[2]

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[1] See, *e.g., FCC* v. *National Citizens Comm. for Broadcasting*, 436 U.S. 775, 795 (1978); *Storer Broadcasting Co.* v. *United States*, 220 F.2d 204, 209 (D.C.Cir. 1955), rev'd on other grounds, 351 U.S. 192 (1956); *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965).

[2] See also *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 F.C.C.2d 354 (1975); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976).

The Commission stated that "broadcasting is an important mass media form which, because it makes use of the airwaves belonging to the public, must obtain a Federal license under a public interest standard and must operate in the public interest in order to obtain periodic renewals of that license." *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 F.C.C.2d 766, 769 (1968). This Court observed in 1976 that FCC regulations dealing with employment practices "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP* v. *FPC*, 425 U.S. 662, 670 n.7 (1976).

The Commission also sought to enhance broadcast program diversity by requiring station owners to "aseertain" the needs, interests and problems of substantial segments of their communities, specifically including "minority and ethnic groups" and to direct their non-entertainment programming to those ascertained needs. See *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418, 419, 442 (1976).

The FCC's initial steps to improve minority participation in broadcasting did not involve the consideration of race as a factor in licensing decisions. In fact, in 1972 the FCC rejected a claim "that Black ownership of a television station is, by itself, in the public interest because only then will the station be truly responsive to the needs of the . . . Black community." *Mid-Florida Television Corp.*, 33 F.C.C.2d 1, 17 (Rev. Bd.), rev. denied, 37 F.C.C.2d 559 (1972), rev'd *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C.Cir. 1973), cert. denied, 419 U.S. 986 (1974). The Commission refused to give credit to an applicant in a comparative licensing proceeding solely on account of the race of its owners, where the record did not give assurance that the owner's race would be likely to affect the quality of the station's broadcast service to the public. The Commission held that under the governing statutory standard for licensing—"the public interest,

convenience, and necessity" (47 U.S.C. 309(a))—licensing determinations depend upon service to the public, not upon the racial makeup of an applicant's stockholders. "Black ownership cannot and should not be an independent comparative factor . . .; rather, such ownership must be shown on the record to result in some public interest benefit." 33 F.C.C.2d at 18.

The court of appeals, however, rejected the Commission's position that the circumstances must give an "advance assurance of superior community service attributable to such Black ownership and participation. . . ." *TV 9, Inc.* v. *FCC*, 495 F.2d at 938. "Reasonable expectation," the court held, "not advance demonstration, is a basis for merit to be accorded relevant factors." *Ibid.* The court explained:

> It is consistent with the primary objective of maximum diversification of ownership of mass communications media for the Commission in a comparative license proceeding to afford favorable consideration to an applicant who, not as a mere token, but in good faith as broadening community representation, gives a local minority group media entrepreneurship. . . . We hold only that when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded.

Id. at 937-938.

Two years later the court emphasized that "[t]he entire thrust of *TV 9, Inc.* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that 'reasonable expectation' without 'advance demonstration,' gives them relevance." *Garrett* v. *FCC*, 513 F.2d 1056, 1063 (D.C.Cir. 1975) (footnotes omitted). See also *West Michigan Broadcasting Corp.* v. *FCC*, 735 F.2d 601, 610-611 (D.C. Cir. 1984), cert. denied, 470 U.S. 1027 (1985).

Following the decisions of the court of appeals in *TV 9, Inc.* and *Garrett*, the Commission modified its policy with respect to the consideration of merit for minority ownership in the context of comparative licensing proceedings. The Commission announced that minority ownership, where the minority owners would participate in the day-to-day operation of the proposed station, would be considered a "plus factor" in determining which among competing license applications to grant. See *WPIX, Inc.*, 68 F.C.C.2d 381, 411-412 (1978). This "plus factor" subsequently was extended to applicants that proposed to include female owners who would be involved in the station's operations. See *Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 652 (Rev.Bd. 1978), set aside on other grounds, 87 F.C.C.2d 203 (1981); *Horne Industries*, 94 F.C.C.2d 815, 822-24 (Rev.Bd. 1983), review denied, 56 Radio Reg.2d (P&F) 665, 668 (1984).

b. *The Distress Sale Policy*

In 1978 a task force formed by the FCC to examine the issue of minority ownership of radio and television broadcast stations issued a report finding that "the minority community continues to be underrepresentated among broadcast station owners" and that this situation was "a direct result" of past society-wide discrimination. FCC Minority Ownership Task Force, *Minority Ownership in Broadcasting* Summary at 1, 7 (1978) [hereafter *Minority Task Force Report*]. The task force found that significant barriers, including lack of information, lack of adequate financing and inexperience in the industry, had hampered the growth of minority ownership. *Id.* at 8-29. The task force recommended that further steps should be taken by the FCC to encourage and facilitate the entry of more minorities into ownership of broadcast stations. *Id.* at 1, 8, 30.

The FCC reviewed the findings of the *Minority Task Force Report* and concluded that there was a need for further action to address the " '[a]cute underrepresentation of minorities among the owners of broadcast properties. . . ." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978) [hereafter *1978 Minority Policy Statement*] (Pet. App. 130a), quoting *Minority Task Force Report* at 1. The Commission found that its initial steps involving employment and ascertainment had not been sufficient. The Commis-

sion noted, referring to the findings of the task force, that fewer than one per cent of the 8500 commercial radio and television stations operating in 1978 were controlled by minorities, although minorities constituted 20 percent of the population. See *1978 Minority Policy Statement*, 68 F.C.C.2d at 981, citing *Minority Task Force Report* at 1 (Pet. App. 133a-34a).[3] The Commission found that although "the broadcasting industry has on the whole responded positively" to previous FCC initiatives, "the views of racial minorities continue to be inadequately represented in the broadcast media." *1978 Minority Policy Statement*, 68 F.C.C.2d at 980 (footnotes omitted) (Pet. App. 132a-133a).

Concluding that "additional measures are necessary and appropriate," *1978 Minority Policy Statement*, 68 F.C.C.2d at 981 (Pet. App. 133a), the Commission responded by adopting the distress sale policy, along with another policy involving tax certificates, in an effort to address the problems illuminated by the task force report. The minority distress sale policy was based on the Commission's belief that "[f]ull minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming . . ." and that "[a]dequate representation of minority viewpoints in programming . . . enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the

[3] See also United States Commission on Civil Rights, *Federal Civil Rights Enforcement Effort* 280 (1971) ("[O]f the approximate[ly] 7,500 radio stations throughout the country, only 10 are owned by minorities. Of the more than 1,000 television stations, none is owned by minorities."), cited in *TV 9, Inc.*, 495 F.2d at 937 n.28; *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1213 n.36 (1971) ("According to the uncontested testimony of petitioners, no more than a dozen of [the] 7,500 broadcast licenses issued are owned by racial minorities."); *Mid-Florida Television Corp.*, 37 F.C.C.2d at 563 (Commissioner Hooks, concurring) ("While there is still no black ownership of a television station, I am told that black ownership of radio stations may be approaching the astronomical figure of 20 out of nearly 7,000."); United States Commission on Civil Rights, *Federal Civil Rights, Federal Civil Rights Enforcement Effort – 1974* at 49 (1974)("In 1973, there were over 7,000 radio stations and 1,000 television stations operating in the United States. Of these, only 33 radio stations located in 20 states and the District of Columbia and no television stations were owned by minority group members.").

First Amendment." *Id.* at 981 (Pet. App. 134a, 133a). Lack of minority representation among owners of broadcast stations, the Commission held, "is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewponts in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience." *Ibid.*

Accordingly, "in order to further encourage broadcasters to seek out minority purchasers," the distress sale policy

> permit[s] licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualifications issues . . . to transfer or assign their licenses at a "distress sale" price to applicants with a significant minority ownership interest, assuming the proposed assignee or transferee meets other qualifications.

Id. at 983 (footnote omitted) (Pet. App. 138a). Ordinarily, FCC policy has precluded licensees whose licenses have been designated for revocation hearing or whose renewal applications have been designated for hearing on basic qualifications issues from selling the station and license until questions about their qualifications have been resolved favorably. See *Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026, 1027 (D.C.Cir. 1981); *Jefferson Radio Co.* v. *FCC*, 340 F.2d 781, 783 (D.C.Cir. 1964); *Bartell Broadcasting of Florida, Inc.*, 45 Radio Reg.2d (P&F) 1329, 1331 (1979). The distress sale program is an exception to that generally applicable policy. It provides a broadcast licensee that is in danger of losing its license with an incentive to transfer its interest to a minority controlled entity in order to recoup part of its investment rather than risk losing virtually everything if its license is revoked or renewal denied.[4] The distress sale policy

[4] Two categories of exceptions had existed to the FCC's general prohibition against the sale of a station while the propriety of a licensee's operation of that station was in serious question: (1) where the licensee was seriously ill or disabled (see *Cathryn Murphy*, 42 F.C.C.2d 346 (1973); and (2) where the licensee corporation was bankrupt and was effecting a sale for the benefit of innocent creditors (see *La Rose* v. FCC, 494 F.2d 1145 (D.C.Cir. 1974)). The

also serves the public interest generally by promptly removing a licensee whose qualifications have been placed in question and relieving the FCC of the necessity of undertaking a costly and time-consuming administrative hearing.[5] The distress sale policy thus adds an opportunity for minorities to acquire established broadcast stations at a reduced cost and through procedures that promote the public interest in prompt and efficient administrative proceedings.

Under the distress sale policy, a qualified minority applicant is one that meets the Commission's basic qualification to be a licensee and in which the minority ownership interest exceeds fifty per cent or is controlling. The distress sale price agreed to by the licensee and the minority buyer may not exceed 75 per cent of the fair market value of the property.[6]

There is no requirement that a licensee in such circumstances transfer its station pursuant to the distress sale policy. The decision whether to seek to use the distress sale policy or to attempt to retain the license and proceed through a hearing is a matter solely for the licensee in question. Thus, the policy does not involve any "quota" or "set-aside." No particular number or per-

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Commission has also made individual exceptions to the rule in rare circumstances. See *RKO General, Inc.*, 3 FCC Rcd 5057, 5062 (1988); *Spanish Int'l Comm. Corp.*, 2 FCC Rcd 3336, 3338 (1987), remanded, *Coalition for the Preservation of Hispanic Broadcasting* v. *FCC*, Nos. 87-1285, et al. (D.C.Cir. Jan. 12, 1990); *A.S.D. Answering Service, Inc.*, 1 FCC Rcd 753, 754 (1986); *George E. Cameron, Jr. Communications*, 56 Radio Reg.2d (P&F) 825, 828 (1984).

[5] See, *e.g.*, *Grayson Enterprises, Inc.*, 47 Radio Reg.2d (P&F) 287, 293 (1980) ("One of the purposes of the distress sale policy is to avoid the administrative burden of hearings to resolve licensee character issues.").

[6] See *Grayson Enterprises, Inc.*, 47 Radio Reg.2d (P&F) at 293. The Commission had initially simply required that the price be "substantially below" the fair market value of the station. See *Northland Television, Inc.*, 72 F.C.C.2d 51, 56-58 (1979). The Commission explained there that determining the allowable price involves a balancing of the conflicting interests of deterrence to licensee misconduct and the promotion of greater minority ownership of broadcast stations. *Id.* at 54. The Commission subsequently concluded that "those divergent goals are most adequately met when a distress sale price does not exceed 75 percent of the station's fair market value." *Lee Broadcasting Corp.*, 47 Radio Reg.2d (P&F) 316, 317 (1980).

centage of broadcast licenses has been reserved for minorities under the distress sale or other FCC minority ownership policies.

Concerned with the continuing " 'dearth of minority ownership' in the telecommunications industry," the Commission expanded the distress sale program in 1982 to permit minority-controlled limited partnerships to benefit from the distress sale program. See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 852 (1982) [hereafter *1982 Minority Policy Statement*].[7] The Commission determined that in the case of limited partnerships, if the general partner is a minority who holds at least a 20 per cent interest in the partnership, and who will exercise "complete control over the station's affairs," that enterprise qualifies as one with "significant minority involvement" and is eligible to participate in the distress sale program. See *id.* at 853-55.

c. *Congressional Action*

Congress has repeatedly endorsed the goals of and directed the FCC to continue to implement the distress sale program as well as other FCC minority ownership policies.[8] Moreover,

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[7] The Commission's action was in response to recommendations of an advisory committee that it had created "for the purpose of exploring means to facilitate minority ownership of telecommunications properties." 92 F.C.C.2d at 852. See *Strategies for Advancing Minority Ownership Opportunities in Telecommunications—Final Report of the Advisory Comm. on Alternative Financing for Minority Opportunities in Telecommunications to the Federal Communications Comm'n* (May 1982).

[8] As a foundation for the statutory enactments discussed below, Congress has held numerous hearings to explore the problem of lack of minority ownership of broadcast stations. See, *e.g.*, *Hearing on Minority Ownership of Broadcast Stations Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation*, 101st Cong., 1st Sess. (Comm. Print Sept. 15, 1989) [hereafter *1989 Hearing on Minority Ownership*]; *Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations*, 100th Cong., 1st Sess. 17-19, 75-77 (1987); *Minority-Owned Broadcast Stations—Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986) [hereinafter

Congress has expanded on policies adopted by the Commission. In 1982, for example, Congress amended the Communications Act to authorize the FCC to award licenses by a system of "random selection," or lottery. The legislation directed the FCC, in creating any such procedure, to grant "an additional significant preference . . . to any applicant controlled by a member or members of a minority group." 47 U.S.C. 309(i)(3)(A). Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Rep. No. 765 (Conf. Rep.), 97th Cong., 2d Sess. 43 (1982) (hereafter H.R. No. 765). Consequently, Congress concluded that "[o]ne means of remedying the past economic disadvantage to minorities which has limited their entry into . . . the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media . . . , is to provide that a significant preference be awarded to minority-controlled applicants in FCC licensing proceedings." *Id.* at 44.[9]

Hearings on H.R. 5373]; Minority Participation in the Media—Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. (1983) [hereinafter *1983 Hearings on Minority Participation]; Parity for Minorities in the Media—Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983) [hereinafter *Hearings on H.R. 1155*].

[9] Congress had enacted a similar statutory scheme a year earlier. See Pub. L. No. 97-35, 95 Stat. 357, 736-37 (1981); H.R. Rep. No. 208 (Conf. Rep.), 97th Cong., 1st Sess. 897 (1981). The FCC chose not to implement that statute for several reasons, including a "lack of specificity in both the statute and the legislative history" regarding preferences to be accorded minorities in any lottery licensing system. *Random Selection/Lottery Systems*, 89 F.C.C.2d 257, 279 (1982). Congress enacted a revised statute within several months, reemphasizing the seriousness with which it viewed the "severe underrepresentation of minorities" and the importance of provisions in the statute designed to enhance diversity of ownership by increasing the number of minority owners of radio and television stations. See H.R. Rep. No. 765 at 43; Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (1982).

In 1987, after the FCC had opened an inquiry concerning the validity of its minority ownership policies (see page 15 below), Congress enacted appropriations legislation containing a provision that prohibited the Commission from spending any appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a re-examination of" the distress sale and other minority ownership policies. Continuing Appropriations Act for the Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329-32 (1987) (Pet. App. 162a). The Senate Appropriations Committee, where the provision originated, explained: "The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority . . . audiences." S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987) [hereinafter S. Rep. No. 182]. Congress has twice extended its prohibition of the use of appropriated funds on modification or repeal of the distress sale and other minority ownership policies.[10]

2. Administrative Proceedings In This Case

This case arose from a license renewal proceeding for a television station in Hartford, Connecticut. After questions had arisen before the Commission in 1978 concerning whether the licensee of the Hartford station, Faith Center, Inc., had, in connection with other stations of which it was also the licensee, solicited funds over the air that were thereafter not used for the purposes described in the broadcast solicitations,[11] the Commis-

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[10] See Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988) (Pet. App. 163a); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989); see also S. Rep. No. 101-144, 101st Cong., 1st Sess. 86 (1989); H. R. Rep. No. 299 (Conf. Rep.), 101st Cong., 1st Sess. 64 (1989); 135 Cong. Rec. H7644 (daily ed. Oct. 26, 1989; 135 Cong. Rec. S12,265 (daily ed. Sept. 29, 1989).

[11] See *Faith Center, Inc.*, 82 F.C.C.2d 1 (1980), *reconsid. denied*, FCC 81-235 (1981), aff'd, mem., *Faith Center, Inc.* v. *FCC*, 679 F.2d 261 (D.C. Cir. 1982), cert. denied, 459 U.S. 1203 (1983).

sion designated Faith Center's application for renewal of its Hartford television station license for a hearing in 1980. *Faith Center, Inc.*, FCC 80-680 (Dec. 21, 1980). Prior to the Commission's action, no party had filed an application seeking to compete with Faith Center's renewal application for authority to operate on that particular channel in Hartford. Faith Center's application had been filed with the Commission on December 1, 1977, and competing applications could have been filed by any party within ninety days thereafter. See 47 C.F.R. 1.516(e)(1) (1977).

In February 1981, Faith Center petitioned the Commission for permission to transfer its license under the FCC's distress sale policy, which the Commission granted. *Faith Center, Inc.*, 88 F.C.C.2d 788 (1981). The proposed sale, however, was not completed, apparently because of the minority purchaser's inability to obtain adequate financing. See J.A. 250, 257-58.[12] In September 1983, the Commission granted a second request by Faith Center to pursue a distress sale to another minority-controlled buyer. At that time, the Commission rejected objections to the distress sale raised by Alan Shurberg.[13] See *Faith Center, Inc.*, 54 Radio Reg.2d (P&F) 1286 (1983); *Faith Center, Inc.*, 55 Radio Reg.2d (P&F) 41 (MM Bur. 1984). This second authorization of a distress sale and assignment of the station license also was not consummated, apparently for similar reasons related to financing the purchase. See J.A. 426.

In December 1983, Shurberg Broadcasting of Hartford, Inc., tendered to the Commission an application for a permit to build a television station in Hartford. J.A. 388. The application was mutually exclusive with Faith Center's still-pending renewal application. In June 1984 Faith Center once again sought the Commission's approval for a distress sale. J.A. 481. Faith Center requested permission to sell the Hartford station to Astroline Communications Company, Limited Partnership, "a

[12] "J.A." refers to the Joint Appendix filed in the court of appeals.

[13] Mr. Shurberg acted at that time in his individual capacity. See 54 Radio Reg.2d (P&F) at 1287 n.10. Mr. Shurberg is sole owner of Shurberg Broadcasting of Hartford, Inc. See J.A. 396.

financially-qualified minority applicant [which is] experienced in broadcast operations." J.A. 490. Shurberg opposed the distress sale on a number of grounds, including the contention that the Commission's distress sale program violated its constitutional right to equal protection. Shurberg therefore urged the Commission to deny the distress sale request and to set the application that it had tendered for a comparative hearing with Faith Center's renewal application. See generally J.A. 780-856, 953-93.

In December 1984, the Commission approved Faith Center's petition for permission to assign its broadcast license to Astroline pursuant to the distress sale policy. *Faith Center, Inc.*, 99 F.C.C.2d 1164 (1984) (Pet. App. 113a). The Commission rejected Shurberg's constitutional challenge to the policy as "without merit" (Pet. App. 122a). In support of the minority distress sale policy, the Commission cited the findings of its *Minority Task Force Report* that there was "an acute underrepresentation of minorities among the owners of broadcast stations and that views of racial minorities were inadequately represented in the broadcast media," together with the Commission's previous observations in the *1978 Minority Policy Statement* "that increasing minority ownership of broadcast stations would result in diversity of control of a limited resource, the broadcast spectrum, and would result in a more diverse selection of programming for the entire viewing and listening public" (*id.* at 122a-123a).

The Commission also found support in decisions of the District of Columbia Circuit, such as *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d at 609-11, and *TV 9, Inc.* v. *FCC*, 495 F.2d at 937, which have "repeatedly defined as an important public interest objective the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations" (Pet. App. 123a). And, the Commission recognized that Congress itself, in expressly requiring that the Commission incorporate "significant preferences for minority applicants . . . into any random selection licensing scheme," has "reaffirmed the importance of fostering minority ownership of broadcast stations" (*id.* at 123a-124a; see 47 U.S.C. 309(i)(3)(A)).

The Commission also rejected the competing application that Shurberg had filed in December 1983 because Shurberg had not complied with controlling regulations that had established the periods during which applications competing with renewal applications for pending stations could be filed. Those regulations precluded acceptance of applications, such as Shurberg's, that would compete with other applications that had already been designated for hearing (Pet. App. 117a-22a). See 47 C.F.R. 73.3516(e) (1983); *Chronicle Broadcasting Co.*, 44 F.C.C.2d 717, 721 (1974), aff'd, *Committee for Open Media* v. *FCC*, 543 F.2d 861 (D.C. Cir. 1976); *City of Angels Broadcasting* v. *FCC*, 745 F.2d 656, 662-664 (D.C. Cir. 1984).

The Commission acknowledged as "a close question" the issue whether "the public interest in permitting competing applications to be filed, as articulated in *New South* [*Media Corp.* v. *FCC*, 685 F.2d 708 (D.C. Cir. 1982)], outweighs the goals of our minority ownership policies in this case." 99 F.C.C.2d at 1170. (Pet. App. 121a). The Commission determined, however, that the public interest goals of the distress sale program were "sufficiently important" to counterbalance the public interest in permitting competing applications to be filed. Specifically, the Commission pointed out that grant of the distress sale proposal in this case, in addition to promptly concluding the proceeding about Faith Center's qualifications, "would advance our important policy of increasing diversity of programming and ownership in the broadcast industry by providing for minority group ownership and control of this station . . ." (Pet. App. 121a). The Commission rejected Shurberg's challenge to Astroline's qualifications as a bona fide minority enterprise under the distress sale program, finding that Astroline's limited partnership ownership structure complied with FCC requirements. Pet. App. 125a-126a. The Commission also found that the price agreed to between the parties—$3.1 million, or approximately 50 per cent of the $6.5 million appraised value of the station—was well within the guidelines which require the distress sale price to be less than 75 per cent of the station's appraised fair market value. See Pet. App. 127a.

3. Intervening Developments

Shurberg sought judicial review of the Commission's order in the court of appeals, but disposition of its appeal was delayed because the Court granted, at the Commission's request, a remand of the record for further consideration in light of a separate non-adjudicatory inquiry proceeding at the Commission to explore the validity of the minority and female ownership policies including the distress sale policy. See *Notice of Inquiry on Racial, Ethnic or Gender Classifications (MM Docket No. 86-484)*, 1 FCC Rcd 1315, 1317-18 (1986).[14]

Prior to the Commission's completion of its inquiry in that proceeding, Congress enacted and the President signed into law legislation that appropriated funds for Commission salaries and expenses for fiscal year 1988, with the following pertinent proviso:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, as amended, 52 R.R. 2d [1301] (1982) and Mid-Florida Tele-

[14] That inquiry grew out of the court of appeals' decision in *Steele* v. *FCC*, 770 F.2d 1192 (D.C.Cir. 1985), vacated & reh. en banc granted, Order of Oct. 31, 1985, remanded, Order of Oct. 9, 1986, mandate recalled, Order of Aug. 15, 1988. In that case a panel of the court of appeals had held that the FCC lacked statutory authority to grant enhancement credits in comparative licensing proceedings to women owners. Although the court observed that "the Commission's authority to adopt minority preferences . . . is clear" (*id.* at 1196), the court's opinion nevertheless raised questions concerning the FCC's minority ownership policies. In a request for remand in the *Steele* case, the Commission explained that it had begun to have reservations, in light of developments in the law, that it had not established an adequate factual basis for its policies encouraging female and minority ownership. Upon grant of its remand request, the Commission began the Docket No. 86-484 inquiry.

vision Corp., [69] F.C.C.2d 607 Rev. Bd. (1978) which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.[15]

In compliance with this legislation, the Commission ordered its MM Docket No. 86-484 closed, thereby terminating the inquiry. See *Order (MM Docket No. 86-484)*, 3 FCC Rcd 766 (1988). In addition, the Commission reaffirmed its *Order* granting the request to assign Faith Center's license for its Hartford television station to Astroline pursuant to the minority distress sale policy. *Faith Center, Inc.*, 3 FCC Rcd 868 (1988).[16]

B. The Court Of Appeals' Decision

A divided court of appeals struck down the Commission's minority distress sale policy as unconstitutional. *Shurberg Broadcasting of Hartford, Inc.* v. *FCC*, 876 F.2d 902 (D.C. Cir. 1989) (Pet. App. 1a). In a brief per curiam opinion, the panel

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[15] Continuing Appropriations Act For Fiscal Year 1988, Pub. L. 100-202, 101 Stat. 1329 (1987) (Pet. App. 162a). Essentially identical provisions have been enacted for subsequent fiscal years. See Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988) (Pet. App. 163a); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989).

[16] On November 4, 1988, an involuntary petition in bankruptcy was filed against Astroline pursuant to 11 U.S.C. Chapter 7. *In Re: Astroline Communications Co., Ltd. Partnership*, Case No. 2-88-01124 (Bankr. D. Conn.). That proceeding was subsequently converted, at Astroline's election, into a voluntary reorganization pursuant to 11 U.S.C. Chapter 11. See 11 U.S.C. 706; Order of Dec. 1, 1988 in Case No. 2-88-01124. The FCC seeks to accommodate the policies of federal bankruptcy law with those of the Communications Act. See *LaRose* v. *FCC*, 494 F.2d 1145 (D.C.Cir. 1974). The bankruptcy action remains pending, and Astroline has continued to operate the station as a "Debtor in Possession." Although Astroline has indicated that its financial condition and future operation of the station are uncertain (see *In re Application of Arnold L. Chase*, 4 FCC Rcd 5085 (1989)), it has not sought any authorization from the FCC to sell the station.

majority held that the policy "unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity," specifically finding that "the program unduly burdens Shurberg, an innocent nonminority, and is not reasonably related to the interests it seeks to vindicate" (Pet. App. 2a). Judges Silberman and MacKinnon, who comprised the panel majority, each filed separate opinions concurring in the judgment. See Pet. App. 3a-52a (Silberman, J.), 53a-69a (MacKinnon, J.). Chief Judge Wald filed a separate dissenting opinion. See Pet. App. 70a-112a.

Judges Silberman and MacKinnon agreed that whether or not there was a compelling governmental interest in remedying societal discrimination or promoting programming diversity,[17] the distress sale policy failed because it was not narrowly tailored to serve either of those interests. They found that there was no reasonable relationship between the operation of the policy and the effects of past discrimination (Pet. App. 27a-30a (Silberman, J.), Pet. App. 61a-63a (MacKinnon, J.)), and the policy unduly burdened innocent third parties by depriving them of an attractive opportunity to compete for a broadcast license (Pet. App. 31a-33a (Silberman, J.), Pet. App. 66a-68a (MacKinnon, J.)). The majority pointed out that unlike other race-conscious programs described in *Johnson* v. *Transportation Agency*, 480 U.S. 616 (1987), and in Justice Powell's opinion in *Regents of the Univ. of Calif.* v. *Bakke*, 438 U.S. 265 (1978), where race was one factor in a multi-factor decision,

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[17] Judge MacKinnon did not reach the question whether these were compelling governmental interests (Pet. App. 59a-60a n.11). Judge Silberman, on the other hand, concluded that the remedial justification was insufficient to constitute a compelling interest because, assuming Congress can redress societal discrimination, general findings of minority underrepresentation in the broadcasting industry were not a sufficient factual predicate upon which Congress could act (Pet. App. 26a). Judge Silberman also found it "doubtful" (Pet. App. 50a) whether the promotion of programming diversity in the broadcast context was a compelling governmental interest. See Pet. App. 37a, 39a n.27).

race was the determinative factor under the distress sale policy (Pet. App. 45a-47a (Silberman, J.), Pet. App. 57a n.6, 62a n.15 (MacKinnon, J.)).

Chief Judge Wald dissented, concluding overall that the "majority's invalidation of the Commission's ten-year old minority distress sale program . . . impermissibly overturns a considered congressional judgment as to the appropriate means of assuring diversity of viewpoint over the national airwaves" (Pet. App. 70a). After reviewing the development of that program (*id.* at 73a-77a), as well as Congress' express and repeated endorsements of the Commission's efforts to encourage diversity in broadcast programming through programs to encourage minority ownership and control (*id.* at 77a-78a), Chief Judge Wald found that the distress sale program is "a deliberately chosen congressional policy" (*id.* at 79a). And, in light of the current case law, she concluded that the policy "is a constitutional means of pursuing Congress' objective: ensuring greater diversity in programming" (*ibid.*). In her view, "[t]he state's interest in ensuring that *all* its people have access to a wide and varied range of broadcast options seems to me to be every bit as compelling as its interest in creating a diverse student body." (*id.* at 89a).

She noted that a variety of parties had concluded that minorities have "distinct perspectives to convey" and that it seemed "foreseeable that these perspectives will find expression in the licensee's programming decision." Pet. App. 92a.[18] She found "most significant," however, Congress' repeated and explicit conclusion that "'[d]iversity of ownership results in diversity of programming.'" *Id.* at 94a, quoting S. Rep. No. 100-182 at 76.

Finally, Chief Judge Wald concluded that the distress sale program did not impermissibly burden innocent nonminorities. She examined the burden that the policy placed on nonminorities as a group and on particular nonminority individuals and

[18] She pointed to findings of the National Advisory Commission on Civil Disorders in 1968 and the United States Commission on Civil Rights in 1977 as well as numerous earlier decisions of the court of appeals. See Pet. App. 93a.

concluded that the "distress sale policy satisfies both these standards" (*id.* at 105a). Noting "the near-monopoly exercised by nonminorities over broadcast media—they control approximately 98% of all broadcast licenses—and the very limited circumstances in which the distress sale policy can be invoked," she found "that the burden the policy places on nonminority applicants is acceptable" (*id.* at 109a).

On June 16, 1989, the court of appeals denied petitions for rehearing and suggestions for rehearing en banc filed by the FCC and by Astroline. Pet. App. 143a, 155a. Chief Judge Wald, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg, dissented from the denial of the suggestion for rehearing en banc. Pet. App. 157a-60a.

SUMMARY OF ARGUMENT

The distress sale policy is a race-conscious measure that has been ordered by Congress in each of the last three years as a part of the FCC's appropriations legislation. Congress enjoys broad legislative power to define and remedy the effects of prior society-wide discrimination. Although Congress need not make specific findings of discrimination in order to engage in race-conscious relief, it had available ample evidence for concluding that the lingering effects of societal discrimination were present in the broadcast industry where minorities own no more than 3.5 percent of radio and television broadcast stations despite constituting some 20 percent of the population.

Congress also had an ample basis for targeting the broadcast industry for remedial action. First, the federal government bore a special responsibility for the establishment of ownership patterns in this industry because of the FCC's authority to license broadcast stations. Second, a diversity of broadcast programming has long been an important objective underlying the regulation of broadcasting, and the absence of minority participation in broadcasting has a deleterious effect on programming diversity. Membership in a minority group is likely to provide a distinct perspective on matters of contemporary public concern that is relevant in assessing a person's potential contribution to diver-

sity, whether the desired diversity is sought for a university classroom or for the broadcast airwaves. The lack of minority participation in the ownership of broadcast stations is particularly significant in terms of realizing the goal of diversity because the FCC has long regarded ownership as a key determinant of broadcast content.

In seeking to increase the ownership of broadcast stations by minorities, Congress was engaged in far more than an abstract pursuit of the ideal of diversity. "[B]roadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). Before Congress acted, both the Kerner Commission in 1968 and the U.S. Commission on Civil Rights in 1978 had warned of the serious consequences of allowing the broadcast medium to be dominated by whites. This domination not only deprives minorities in the audience of programming that fairly reflects their tastes and viewpoints, but also prevents the larger audience from receiving the minority perspective on matters of concern to the community as a whole.

The distress sale policy is narrowly tailored to serve Congress' interest in remedying the lack of diversity in broadcast programming which has resulted from the severe underrepresentation of minorities in the broadcast industry. As discussed above, membership in a minority group is likely to provide a distinct perspective on public issues. Bringing minorities into broadcast ownership will enhance the capacity of the broadcast medium to convey that severely underrepresented perspective and thereby increase the diversity of programming because the relationship between ownership and programming has long been a fundamental tenet of the FCC's regulation of broadcasting.

The FCC, and subsequently Congress, turned to the distress sale policy and related race-conscious licensing measures only after seeking for many years to encourage diversity of ownership without consideration of race. When the agency's general approach to diversification did not succeed where minorities were concerned, and the *Kerner Commission Report* dramatically brought the problem to the FCC's attention, the FCC did

not proceed immediately to adopt the distress sale and other race-conscious licensing policies. The agency instead first resorted to rules which sought to require licensees to employ more minorities and to ascertain the needs of their minority audience. Before Congress adopted the distress sale policy in 1987, the FCC had also relaxed the minimum showing necessary to demonstrate financial qualifications to receive a broadcast license, and had increased the number of new broadcast stations available for initial licensing. In view of the failure of the FCC's various initiatives to improve significantly the level of minority participation, Congress properly exercised its broad discretion to select the methods for pursuing its objectives when it compelled the Commission to utilize the distress sale and other race-conscious licensing policies. The methods Congress has chosen do not undermine the important countervailing goal of stability in the broadcast industry.

The burden imposed on innocent nonminorities by the distress sale policy is permissible. The distress sale policy over its ten-year existence has operated to deprive nonminorities of only a minuscule fraction of their opportunities to purchase, or compete for, the license for a broadcast station. Moreover, the policy involves no attempt to remove existing owners for the purpose of making room for new minority owners.

ARGUMENT

I. THE DISTRESS SALE POLICY REFLECTS A CONSIDERED AND DELIBERATE CONGRESSIONAL CHOICE THAT IS WITHIN CONGRESS' POWER.

The distress sale policy is a "deliberately chosen congressional policy" (Pet. App. 79a) that employs racial criteria in a narrowly defined program designed to assist in remedying the present effects of past discrimination. These effects include a "dearth of minority ownership in the broadcast industry" (Pet. App. 134a) and inadequate representation of "the views of racial minorities . . . in the broadcast media." (Pet. App. 133a). Congress has repeatedly addressed the problem of minority ownership of radio and televison stations. It has made findings that there is a

need for increased minority ownership, endorsed policies initiated by the FCC including the distress sale policy, enacted policies of its own creation and ultimately enacted into law the distress sale and other programs to increase minority representation among radio and television station owners. The distress sale policy is within Congress' broad power under the commerce clause and the fourteenth amendment.

A. Congress Carefully Considered And Deliberately Enacted The Distress Sale Policy To Address The Identified Problem Of Lack Of Minority Ownership Of Radio And Television Stations.

In *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), Chief Justice Burger observed in the plurality opinion that although "[a] program that employs racial or ethnic criteria, . . . calls for close examination," when that program is one deliberately adopted by the Congress the Court is "bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." *Id.* at 472. The Chief Justice's opinion concluded that even where legislation implicates "fundamental constitutional rights" such as the equal protection component of the fifth amendment, courts should accord " 'great weight to the decisions of Congress' . . . ." *Ibid.*, quoting, *Columbia Broadcasting System, Inc.* v. *Democratic National Comm.*, 412 U.S. 94, 102 (1973). See also 448 U.S. at 503-504 (Powell, J.).

In 1982 Congress enacted legislation authorizing the use of "random selection" in the FCC licensing process, but specifically requiring that significant preferences for minority applicants be incorporated into any random selection licensing scheme. See Communications Amendments Act of 1982, Pub.L. No. 97-259, 96 Stat. 1087, 1094-1095, codified at 47 U.S.C. 309(i)(3)(A) and (C)(ii). The conference report on that legislation found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe under-

representation of minorities in the media of mass communications." H.R. Rep. No. 765 at 43. The report also found ownership preferences to be "an important factor in diversifying the media of mass communications" (*ibid.*) and stated that "[t]he underlying policy objective of these preferences is to promote the diversification of media ownership and consequent diversification of program content." *Id.* at 40. As the conference report explained, "[i]t is hoped that this approach to enhancing diversity through such structural means will in turn broaden the nature and type of information and programming disseminated to the public." *Id.* at 43.

Congress expressly endorsed the FCC's minority ownership policies, including the distress sale policy, in adopting the 1982 lottery legislation, as proper means to achieve diversity. See H.R. Rep. No. 765 at 44 ("Evidence of the need for such preferential treatment has been amply demonstrated by the Commission, the Congress, and the courts. See, in this regard, Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 (1978).") And in three subsequent appropriations acts the Congress has explicitly instructed the Commission to continue to implement the minority ownership policies, "including those established in Statement of Policy on Minority Ownership of Broadcast Facilities, 68 F.C.C.2d 979 . . . ," in which the Commission adopted the distress sale policy. See Pub. L. No. 100-202, 101 Stat. 1329-31 (1987) (Pet. App. 162a).[19] The Senate Report on that legislation explained:

> The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences. In approving a lottery system for the

[19] See also Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988) (Pet. App. 163a); Departments of Commerce, Justice, & State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989).

> selection of certain broadcast licensees, the Congress explicitly approved the use of preferences to promote minority and women ownership. See 47 U.S.C. sec. 309(i)(3)(A) and H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 37-44 (1982).

S. Rep. No. 100-182 at 76. Thus Congress has expressly determined that diversity in broadcast programming is an important policy goal, that there is a need for race-conscious remedies like the distress sale policy in licensing broadcast stations, and that increasing ownership diversity leads to increased program diversity.[20]

In its consideration and enactment of legislation dealing with minority ownership of broadcast stations, Congress had available to it ample evidence upon which it could reasonably base its conclusion that there is a need for these limited remedial efforts in the broadcast area. For example, in the legislative history of the 1982 lottery legislation, the conference report stated that "[e]vidence of the need for such preferential treatment has been amply demonstrated by the Commission, the Congress, and the courts." H.R. Rep. No. 765 at 44. The conference report referred specifically to the FCC's *1978 Policy Statement* and the related *Minority Ownership Task Force Report*. The Minority Ownership Task Force had found that minorities "continue[d] to be underrepresented among broadcast station owners" and that significant barriers in the areas of financing, industry experience and information about ownership opportunities continued to "hinder the entrance of minority broadcasters." *Minority Task Force Report* Summary at 1.

The FCC's *1978 Policy Statement* endorsed these findings, concluding that "additional measures are necessary and appropriate" to address a situation in which "the views of racial

[20] See *Winter Park Communications, Inc.* v. *FCC*, 873 F.2d 347, 355 (D.C. Cir. 1989), cert. granted, *Metro Broadcasting, Inc.* v. *FCC*, 110 S.Ct. 715 (1990) ("Like the set-aside plan in *Fullilove*, the FCC's minority preference policy has Congress' express approval. Congress has interceded at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses."); see also, *West Michigan Broadcasting Co.*, 735 F.2d at 615.

minorities continue to be inadequately represented in the broadcast media." 68 F.C.C.2d at 980-81 (footnote omitted) (Pet. App. 133a). The conference report also relied explicitly on this Court's decision in *Fullilove*[21] and on the decision of the court of appeals in *Citizens Communications Center* v. *FC*, 447 F.2d 1201 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972).[22]

Congress has also regularly conducted hearings to acquire information with specific reference to participation by minorities in the broadcasting industry. See n.8 above. These hearings have provided extensive evidence of the severe underrepresentation of minorities in the ownership of radio and television stations.[23]

[21] Specifically, the conference report noted this Court's reference in *Fullilove* to numerous "congressional observations with respect to the effect of past discrimination on current business opportunities for minorities . . . ." 448 U.S. at 467 n.55.

[22] *Citizens Communications Center* did not involve a race conscious policy. However, the conference report referred to language in the opinion in that case emphasizing that an important aspect of the public interest standard of the Communications Act "is the need for diverse and antagonistic sources of information. . . . 'The Commission . . . may also seek in the public interest to certify as licensees those who would speak out with fresh voices, would most naturally initiate, encourage, and expand diversity of approach and viewpoint.' . . . As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies." 447 F.2d at 1213 n.36.

[23] See, *e.g.*, *Hearings on H.R. 5373* at 1 (statement of Rep. Collins that fewer than 2% of stations minority owned); *id.* at 13 (statement of Rep. Wirth to same effect); *id.* at 89-90 (reporting figures compiled by FCC to same effect); *id.* at 116 (statement of broadcast industry executive to same effect); *1983 Hearings on Minority Participation* at 7 (statement of Wilhelmina Cooke, representative of Black Citizens for a Fair Media, comparing minority ownership of 2% of broadcast stations to minority representation of 20% of population); *id.* at 21, 28-29 (statement of Paul Yzaguirre representing La Raza citing statistics on lack of Hispanic participation in broadcast industry); *id.* at 61-63, 138 (statement of Arnold Torres representing League of United Latin American Citizens to same effect); *id.* at 39 (statement of Peggy Charren representing Action for Children's Television citing lack of minority representation in both broadcast station and cable television system ownership); *Hearing on H.R. 1155* at 3 (statement of Rep. Collins citing statistics showing that

In addition, Congress was aware of conclusions of the *Kerner Commission Report* and the United States Commission on Civil Rights concerning the need for policies directed to the extreme underrepresentation of minorities in the broadcasting industry. See *Kerner Commission Report* at 201-12; United States Commission on Civil Rights, *Window Dressing On The Set: Women and Minorities in Television* (1977); United States Commission on Civil Rights, *Window Dressing On The Set: An Update* (1979). These reports were referred to repeatedly in various congressional hearings.[24]

Most recently, the Congressional Research Service conducted a study of minority ownership and programming on broadcast stations which found (1) that minorities continued to be underrepresented among those controlling broadcast stations and (2) that there is a "strong indication" that ownership of stations by minorities resulted in a greater degree of minority programming. *See* Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (1988) [hereafter *CRS Report*].[25]

In the decision below, Judge Silberman disregarded Congress' factual basis for approval of the distress sale program because Congress, in his view, failed to make "historical findings of fact," and lacked "support of any material developed in congressional hearings. . . ." Pet. App. 45a, 47a. This is, as we have shown above, a mistaken view. Congress did make findings that

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fewer than 2% of broadcast stations and 1% of cable systems are minority owned); *id.* at 147 (ownership study done by National Ass'n of Broadcasters); *id.* at 192 (survey of "Minority Business Involvement in the Telecommunications Industry" prepared for the Minority Business Development Agency of the Department of Commerce).

[24] See, *e.g.*, *1983 Hearings on Minority Participation* at 7, 20, 101, 155. In addition, other studies by groups such as the NAACP, the Radio-Television News Directors Association, the Screen Actors Guild, the League of United Latin American Citizens and the National Ass'n of Broadcasters were entered into the record in these hearings. See *id.* at 46, 47, 69 170.

[25] The *CRS Report* found that 13.4% of stations had one or more minority owners, but that minorities held controlling interest in only 3.5% of stations. See *CRS Report* at CRS-9.

were supported by a variety of sources. Congress has conducted numerous hearings on the subject of minority ownership of broadcast stations from which it gained knowledge of the need for the distress sale policy. See, *e.g.*, pages 25-26 and n.8 above. Even if it had not, however, as the plurality held in *Fullilove*, "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." 448 U.S. at 478. Indeed, Justice Stevens' dissent in *Fullilove* pointed out that the set-aside provisions of the legislation before the Court in that case were "not even mentioned in the . . . Reports of either the House or the Senate committee that processed the legislation, and was not the subject of any testimony or inquiry in any legislative hearing on the bill that was enacted." 448 U.S. at 549-50. The floor debate was characterized by Justice Stevens as "brief" and "perfunctory" in which "only a handful of legislators spoke and there was virtually no debate." *Id.* at 550. As the dissent below noted, "[t]hose Justices [in *Fullilove*] who voted to uphold the program did not contest Justice Stevens' assertion that congressional debate had been scanty" (Pet. App. 82a).

The Chief Justice's opinion in *Fullilove* relied extensively on a congressional report that drew "presumptions" from statistical information demonstrating substantial underrepresentation by minorities a business owners. Referring to this information, the Chief Justice's opinion quoted favorably a Congressional report that had observed that " '[t]hese statistics are not the result of random chance. The *presumption* must be made that past discriminatory systems have resulted in present economic inequities.' " 448 U.S. at 465(Burger, C.J.), quoting H.R. Rep. No. 468, 94th Cong., 2d Sess. 30 (1975) (emphasis added). Congress relied on similar statistical materials here, concluding that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." H.R. Rep. No. 765 at 43.

Justice Powell observed in *Fullilove* that Congress' "constitutional role is to be representative rather than impartial, to make

policy rather than to apply settled principles of law. . . . Congress is not expected to act as though it were duty bound to find facts and make conclusions of law." 448 U.S. at 502. Accordingly, he concluded that

> Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation.

Id. at 502-503. See also *City of Richmond* v. *J.A. Croson Co.*, 109 S.Ct. 706, 719 (1989) (O'Connor, J.); *id.* at 736 (Scalia, J.). So too, here, Congress was not legislating in a vacuum when it enacted into law the distress sale and other minority ownership policies. The distress sale policy had been in effect for more than nine years as an administrative policy before Congress enacted it into law, and Congress was aware of "two decades of congressional, judicial and agency findings" (Pet. App. 93a (Wald, C.J.)), including its own inquiries and experience relating to the need for remedial policies in the broadcast area as well as more general findings such as the ones cited in *Fullilove*, along with findings of the *Kerner Commission Report*, reports of the U.S. Commission on Civil Rights and the FCC. See H.R. Rep. No. 765 at 44; S. Rep. No. 182 at 76.

Whether there is some irreducible minimum of evidence Congress must have to support its policy judgment that there is a need to employ race conscious policies is a question that the Court need not decide here. It is plain that the evidence before Congress in this instance exceeded any reasonable minimum that might apply.

B. The Distress Sale Policy Is A Remedy That Is Within The Power Of Congress.

In the Communications Act of 1934, Congress, pursuant to its authority to regulate interstate and foreign commerce (U.S.

Const. Art. I, § 8) assigned to the Federal Communications Commission the exclusive authority to grant licenses to build and operate radio and television stations in the United States. 47 U.S.C. 151, 301, 303, 307. The standard governing the exercise of that authority is the "public convenience, interest or necessity" (47 U.S.C. 307), and the "avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 217 (1943).

Although this case involves the licensing conduct of a federal agency, the fifth amendment's due process clause contains an equal protection guarantee similar to that found in the fourteenth amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954). It is thus significant, as Justice O'Connor pointed out in *Croson*, that "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *Croson*, 109 S.Ct. at 719 (O'Connor, J.), citing *Katzenbach* v. *Morgan*, 384 U.S. 641, 651 (1966); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 326 (1966); *Ex parte Virginia*, 100 U.S. 339, 345 (1800).[26]

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[26] See also *Croson*, 109 S.Ct. at 736 (Scalia, J.) ("We have in some contexts approved the use of racial classifications by the Federal Government to remedy the effects of past discrimination. . . . [I]t is one thing to permit racially based conduct by the Federal Government – whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment . . . – and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed . . . ."); *Shurberg*, 876 F.2d at 939 (Pet. App. 80a n.13) (Wald, C.J.) ("[W]hile the congressional judgment is not dispositive, it surely makes a difference. Congress has far broader powers than does an administrative agency; its findings of fact are entitled to greater respect; and, unlike the agency, it need not compile a formal record or issue an opinion. Moreover, section 5 of the fourteenth amendment entrusts Congress with the authority to implement equal protection guarantees. These factors do not obviate the need for judicial review, but they do shape the contours of our inquiry.").

Congress' broad remedial powers to employ race-conscious policies to remedy the effects of past discrimination, based on its expansive authority generally and enhanced by the fourteenth amendment, have been acknowledged repeatedly. See, *e.g., Fullilove,* 448 U.S. at 477-480 (Burger, C.J.); *id.* at 502-03 (Powell, J.); *Croson,* 109 S. Ct. at 719 (O'Connor, J.); *id.* at 736-37 (Scalia, J.). The broadcast industry is a particularly appropriate area within which Congress "may identify and redress the effects of society-wide discrimination," *Croson,* 109 S.Ct. at 719 (O'Connor, J.), because (1) a federal licensing agency has played a major role in the establishment of ownership patterns in this industry (see pages 30-31 below) and (2) "broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population." *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 177 (1968).[27]

Broadcasting, unlike other industries, such as the construction industry in *Fullilove* and *Croson,* involves the use of a unique, limited resource pursuant to a system of government licensing. The most desirable licenses—those using the frequencies with widest coverage and in the largest communities—were issued during the formative years of the industry, which also happened to be when societal discrimination against minorities was at its peak.[28] These stations were obtained at a modest cost

[27] See also U.S. Commission on Civil Rights, *Window Dressing on the Set* at 1 ("Television plays the dominant role in the mass communication of ideas in the United States today. . . . Television does more than simply entertain or provide news about major events of the day. It confers status on those individuals and groups it selects for placement in the public eye, telling the viewer who and what is important to know about, think about, and have feelings about.").

[28] Percy Sutton, Chairman of Inner City Broadcasting, testified before a congressional committee in 1989: "When I sought—when my family sought to buy a radio station in the year 1942, in San Antonio, Texas, nobody would sell them a radio station. There was a building, sir, in San Antonio, Texas, that we owned, that we could not even collect rent from. We had to have a white person collect the rent." *1989 Hearing on Minority Ownership* at 16.

by today's standards.[29] Entrenched ownership patterns understandably have developed because, as this Court has recognized, the Commission has over the years "consistently acted on the theory that preserving continuity of meritorious service furthers the public interest." *FCC* v. *NCCB,* 436 U.S. at 805. The FCC's justifiable efforts to preserve existing meritorious service have, however, had the effect of inhibiting the opportunities for minorities to own those desirable broadcast stations that were initially licensed during the period when minorities did not participate in the industry either as owners or employees. See, *e.g., Minority Task Force Report* at 10 (noting the difficulty in minorities' entry into the broadcast industry by applying for a new station on an unused frequency because "there are very few unused frequencies available, particularly in communities of substantial size.").[30]

Thus, after more than forty years of FCC licensing of radio and television stations—from 1934 until 1978—less than one per cent of those stations were controlled by minorities, despite the fact that minorities represented 20 per cent of the population. Pet. App. 133a. Congress found that this severe underrepresentation of minorities did not occur by chance, but was one of the "effects of past inequities stemming from racial and ethnic discrimination . . . ." H.R. Rep. No. 765 at 43. The distress sale program thus is, as the dissent noted below, a remedial effort in the broad sense: "it seeks to address (or remedy) a societal problem (the underrepresentation of minorities in the broadcast field, and the consequent lack of diverse programming) which has been caused by past racial discrimination." Pet. App. 110a.

[29] During that same testimony, Percy Sutton described this effect of past discrimination as a "black tax": "[M]inorities, and specifically minorities who are of African descent, have not had the opportunity. In the past, I remarked upon this as a black tax. That is, when we buy a radio station now, we must pay much more money." *1989 Hearing on Minority Ownership* at 16.

[30] As noted below (n.35), the Commission has sought to address the lack of available frequencies by adding additional frequencies for new applicants.

II. PROMOTING DIVERSITY IN BROADCAST PROGRAMMING IS A COMPELLING GOVERNMENTAL INTEREST THAT IS AN APPROPRIATE BASIS FOR A RACE-CONSCIOUS GOVERNMENT POLICY.

This Court has recognized on a number of occasions that diversity of ownership of the mass media, including radio and television stations, is likely to enhance the diversity of ideas and expression favored by the first amendment. See, *e.g.*, *Associated Press* v. *United States,* 326 U.S. 1, 20 (1945); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969); *FCC* v. *NCCB,* 436 U.S. at 795. Congress, the court of appeals and the FCC have also all found that this general principle is specifically applicable to the regulation of broadcasting. See *Citizens Communications Center* v. *FCC,* 447 F.2d at 1213 n.36; H.R. Rep. No. 765 at 40; S. Rep. No. 182 at 76; *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d at 394; 1978 Minority Policy Statement, 68 F.C.C. 2d at 980-981 (Pet. App. 134a-137a).

In the context of higher education, promotion of diversity has been found to constitute a sufficiently important or compelling government interest to warrant the use of race conscious policies. See *Bakke,* 438 U.S. at 311-312 (Powell, J.) (concluding that race could be considered as one factor in a university's admission program because "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education."). Justice O'Connor has observed that "although its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant* v. *Jackson Bd. of Educ.,* 476 U.S. 267, 286 (1986) (O'Connor, J.), citing *Bakke,* 438 U.S. at 311-315 (Powell, J.); *Wygant,* 476 U.S. at 306 (Marshall, J., dissenting); *id. at* 315-17 (Stevens, J., dissenting). And Justice O'Conner added: "[N]othing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts

but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." *Id.* at 286 (O'Connor, J.).

The court of appeals has repeatedly found that promoting diversity, in the context of broadcast station ownership, is analogous to the promotion of diversity in the context of higher education, as discussed by Justice Powell in *Bakke,* and is a compelling government interest warranting use of race-conscious government policies. In *TV 9, Inc.* the court of appeals noted the Commission's longstanding policy under the Communications Act of promoting diversity of ownership of broadcast stations along with the established connection between ownership diversity and the "diversity of ideas and expression required by the First Amendment." *TV 9, Inc.,* 495 F.2d at 937. The court also took note of the extreme underrepresentation of minorities in the ownership of broadcast stations. See *id.* at 937 n.28. Based on these considerations, the court concluded that

> when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded. The fact that other applicants propose to present the views of such minority groups in their programming, although relevant, does not offset the fact that it is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proven to be significantly influential with respect to editorial comment and the presentation of news.

Id. at 938 (footnotes omitted). See also *Garrett* v. *FCC,* 513 F.2d at 1063 ("The entire thrust of *TV 9* is that black ownership and participation together are themselves likely to bring about programming that is responsive to the needs of the black citizenry, and that that 'reasonable expectation,' without 'advance demonstration,' gives them relevance." (footnotes omitted)).

A decade later, the court in *West Michigan Broadcasting Co.* v. *FCC* again concluded that promotion of diversity was a sufficiently important governmental interest to warrant a race conscious policy: "Clearly, under Justice Powell's approach the FCC's goal of bringing minority perspectives to the nation's

listening audiences would reflect a substantial government interest within the FCC's competence that could legitimize the use of race as a factor in evaluating permit applicants." *West Michigan Broadcasting Co.*, 735 F.2d at 614. The court of appeals recently reiterated this view, concluding that "none of the [Supreme] Court's recent cases has undermined the holding in *West Michigan.*" *Winter Park Communications,* 873 F.2d at 353.

The Commission has set forth in detail the diversity-related basis for its minority ownership policies:

> Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment. . . . [T]he Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming. . . . In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

1978 Minority Ownership Policy Statement, 68 F.C.C. 2d at 980-981 (Pet. App. 133a-134a) (citing *Minority Task Force Report*). The goal of the FCC's race-conscious policies, now mandated by Congress, is thus quite different from the "role model" theory criticized in *Wygant* (see 476 U.S. at 274-275) in that the FCC policies assume "that viewers and listeners of *every* race will benefit from access to a broader range of broadcast fare, not that consumers will inevitably gravitate towards programming disseminated by licensees of their own race" (Pet. App. 86a, Wald, C.J., dissenting).[31]

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[31] See also *Waters Broadcasting Corp.*, 91 F.C.C.2d 1260, 1264-1265 (1982), aff'd, *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601 ("[T]he public interest benefits and advantages of minority ownership are not dependent on proof that the minority owned station will specifically program to meet minority needs" but are based on the agency's prediction that "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation. . . ."); *Clear Channel Broadcasting,* 83 F.C.C. 2d 216, 221 (1980), aff'd, *Loyola Univ.* v. *FCC,* 670 F.2d 1222 (D.C. Cir. 1982) ("[W]e believe that minority-controlled stations can have the additional function of educating non-minorities about minority viewpoints. . . ."); *1978 Minority Policy Statement,* 68 F.C.C. 2d at 981 (Pet. App. 134a).

III. THE DISTRESS SALE POLICY HAS BEEN NARROWLY TAILORED TO ACHIEVE ITS INTENDED GOAL.

The Court has not thus far discussed how the "narrowly tailored" aspect of a "strict scrutiny" standard of review should be applied to a race conscious program aimed at promoting diversity (Pet. App. 59a n.11, MacKinnon J., concurring). For the reasons that follow, however, the Court should conclude that the distress sale policy is narrowly tailored to achieve its objective.

A. A Nexus Between Ownership And Programming Has Been Established.

The FCC determined in its *1978 Policy Statement* that "diversification in the areas of programming and ownership—legitimate public interest objectives of this Commission—can be more fully developed through our encouragement of minority ownership of broadcast properties." 68 F.C.C. 2d at 981 (Pet. App. 134a). This conclusion was based in part on a finding of the agency's Minority Ownership Task Force that

> Acute underrepresentation of minorities among the owners of broadcast properties is troublesome because it is the licensee who is ultimately responsible for identifying and serving the needs and interests of his or her audience. Unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial proportion of our citizenry will remain underserved and the larger, nonminority audience will be deprived of the views of minorities.

Minority Task Force Report at 1.

Congress expressly found in 1982 that the "nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts." H.R. Rep. No. 765 at 40. In 1987 Congress reiterated this conclusion, stating that "[d]iversity of ownership results in diversity of programming." S. Rep. No. 182 at 76.[32] This was, as the report noted, consistent with earlier determinations made by the Commission and the court of appeals. See, *e.g.*, *TV 9, Inc.*, 495 F.2d at 938 ("[I]t is upon ownership that public policy places primary reliance with respect to diversification of content, and that historically has proved to be significantly influential with respect to editorial comment and the presentation of news.").

The Kerner Commission had earlier arrived at the same conclusion as the FCC's *Minority Task Force Report* concerning the effects of a lack of minority participation in broadcasting:

> The media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed. Slights and indignities are part of the Negro's daily life, and many of them come from what he now calls the "white press"—a press that repeatedly, if unconsciously, reflects the biases, the paternalism, the indifference of white America. This may be understandable, but it is not excusable in an institution that has the mission to inform and educate the whole of our society. . . . The absence of

[32] As noted earlier, the Commission had begun an inquiry in 1986 to examine whether *it* had established an adequate factual basis, in light of its then understanding of developing legal standards governing race-conscious policies, for a determination that there exists "a nexus between minority/female ownership and viewpoint diversity. . . ." *Notice of Inquiry*, 1 FCC Rcd at 1317. See page 15 above. Congress concluded that "the inquiry is unwarranted" in light of Congress' repeated findings that such a nexus does exist. S. Rep. No. 182 at 76. The Congressional Research Service study of minority ownership and programming diversity found a "strong indication" that such a connection exists. See *CRS Report* Appendix at 1.

> Negro faces and activities from the media has an effect on white audiences as well as black. If what the white American reads in the newspapers and sees on television conditions his expectation of what is ordinary and normal in the larger society, he will neither understand nor accept the black American.

Kerner Commission Report at 203. A decade later, the United States Commission on Civil Rights endorsed this view, summarizing that the Kerner Commission had "concluded that a mass medium dominated by whites will ultimately fail in its attempts to communicate with an audience that includes blacks. A similar conclusion could be drawn in regard to other racial and ethnic minorities . . . ." United States Commission on Civil Rights, *Window Dressing On The Set: Women and Minorities in Television* 2 (1977).

Testimony in congressional hearings concerning minority participation in the broadcasting industry has echoed the same themes.

> [T]he importance of minority ownership is clear. Minorities need to have a voice that speaks to them, for them and about them. Black owned radio and television stations are not afraid to push voter registration. Black owned broadcast stations are not afraid to talk about South Africa. In particular, black owned radio stations give black politicians a chance to be heard. Black people

> listen to black radio. Because black radio stations still subscribe to the concept of operating in the public interest. Black radio is local. It's the church program on Sunday, it's the community school, it's the forum for issues that many non-minority owned radio owners would consider too "sensitive," too "one issue oriented" or "not sexy enough."

Hearings on H.R. 5373 at 164-165 (statement of Jesse L. Jackson).

B. Adoption Of The Policy Followed Implementation Of Alternative Methods Of Addressing The Lack Of Minority Ownership That Proved Inadequate.

The Court in other contexts has emphasized that an important consideration in a "narrowly tailored" analysis is whether there has been prior consideration of the use of alternatives. See *Croson*, 109 S.Ct. at 728; *United States* v. *Paradise*, 480 U.S. 149, 171 (1987); *Fullilove*, 448 U.S. at 463-467 (Burger, C.J.); *id.* at 511 (Powell, J.). In this regard, the FCC for many years followed policies of encouraging diversity of ownership without consideration of race, i.e., it sought to minimize concentration of control of broadcast stations and thus maximize the opportunities for individuals or organizations to control stations. See page 2 above. As indicated earlier, despite following such policies for several decades, minorities remained severely underrepresented in the ownership of broadcast stations. Moreover, the "distress sale policy was adopted only after specific findings by the FCC that equal employment opportunity rules and ascertainment policies alone were insufficient to accomplish significant minority participation in programming." Pet. App. 97a-98a (Wald, C.J., dissenting) (footnotes omitted). See also *1978 Minority Policy Statement*, 68 F.C.C.2d at 981 (Pet. App. 130a-33a); *Random Selection/Lottery Systems*, 88 F.C.C.2d 476, 489 (1981).

Assuming that the FCC was required to consider alternatives specifically addressed to minorities' lack of financing to enter into broadcast ownership (Pet. App. 30a-32a, Silberman, J), the FCC had already taken a number of actions specifically addressed to these entry barriers before Congress acted in 1987 to

compel the distress sale and other race-conscious policies. For example, the minimum showing necessary to demonstrate financial qualifications to receive a radio or television station license was reduced in order to lower this barrier to minority applicants.[33] In addition, the Commission adopted procedures to disseminate more widely information about the availability of potential minority buyers of broadcast stations.[34] The Commission also has taken steps to increase the total number of radio and television stations, thus increasing the opportunities for minorities to enter the broadcast industry.[35] Despite these substantial initiatives not involving racial licensing preferences, the Commission concluded in 1982 that the " 'dearth of minority

[33] Section 308(b) of the Communications Act, 47 U.S.C. 308(b), authorizes the FCC to elicit information from applicants regarding their financial qualifications to operate a station. The Commission had required applicants to demonstrate the availability of sufficient funds to construct and operate the station for one year. See *Ultravision Broadcasting*, 1 F.C.C. 2d 544 (1965). This requirement was identified by the Minority Ownership Task Force as one of the barriers to increased minority ownership. See *Minority Task Force Report* 11-12. The requirement subsequently was reduced to three months. See *New Financial Qualifications for Aural Applicants*, FCC 78-556 (Aug. 2, 1978); *New Financial Qualifications Standard for Broadcast Television Applicants*, FCC 79-299 (May 11, 1979).

[34] See FCC EEO-Minority Enterprise Division, *Minority Ownership of Broadcast Facilities: A Report* 8-9 (Dec. 1979) (describing agency establishment of "a listing of minority persons interested both in purchasing broadcast stations and in making themselves known to broadcast station sellers and brokers").

[35] See, *e.g.*, *Availability of FM Broadcast Assignments*, 101 F.C.C. 2d 638 (1985), reconsid. granted in part and denied in part, 59 Radio Reg. 2d (P&F) 1221 (1986), aff'd, *National Black Media Coalition* v. *FCC*, 822 F.2d 277 (2d Cir. 1987); *Clear Channel Broadcasting in the AM Band*, 78 F.C.C. 2d 1345 (1980); *Low Power Television Service*, 51 Radio Reg. 2d (P&F) 476 (1982), reconsid. granted in part and denied in part, 53 Radio Reg. 2d (P&F) 1267 (1983).

ownership' in the telecommunications industry" continues to be a "serious concern" warranting expansion of the distress sale policy. *1982 Policy Statement,* 92 F.C.C.2d at 852.[36]

The range of available alternatives for increasing minority participation in broadcast programming is limited. Section 3(h) of the Communications Act, 47 U.S.C. 153(h), for example, provides that a broadcaster "shall not . . . be deemed a common carrier." The Court has held that "consistently with the policy of the Act to preserve editorial control of programming in the licensee," Section 3(h) "forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems." *FCC* v. *Midwest Video Corp.,* 440 U.S. 689, 705 (1979) (footnote omitted). The Court, moreover, has made clear that "the important purposes of the Communications Act" to preserve for broadcasters a high degree of editorial discretion and to minimize government control over broadcast content are "grounded in the First Amendment." *FCC* v. *League of Women Voters of California,* 468 U.S. 364, 379-80 (footnote omitted), citing *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. at 94, 110, 126. Given the limitations on its authority in this area, the FCC has traditionally sought to promote diversity by structural regulations, of which the distress sale policy is one example, "without on-going government surveillance of the content of speech." *FCC* v. *NCCB,* 436 U.S. at 801-02; see also *id.* at 780-781 and nn.1-3.

Even where structural regulations are concerned, the FCC's steps to promote diversity have been limited by important countervailing public interest considerations. The Commis-

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[36] In 1985, the Commission proposed to expand further the availability of the distress sale policy by broadening the time period during which a licensee could elect to sell its station pursuant to that policy. See *Distress Sale Policy for Broadcast Licensees—Notice of Inquiry,* 50 Fed. Reg. 42047 (1985). That proceeding was recently terminated without any action by the Commission without prejudice to further consideration following resolution of the instant litigation. *Distress Sale Policy for Broadcast Licensees—Order,* FCC 89-374 (Jan. 11, 1990).

sion, for example, "has consistently acted on the theory that preserving continuity of meritorious service furthers the public interest" and thus "both the Commission and the courts have recognized that a licensee who has given meritorious service has a 'legitimate renewal expectanc[y]' that is 'implicit in the structure of the Act' and should not be destroyed absent good cause." *FCC* v. *NCCB,* 436 U.S. at 805-806 (citations omitted). The renewal expectancy policy, however, severely limits minorities' ability to compete for existing, established stations, which occupy the overwhelming majority of available broadcast frequencies.[37]

Based on the Commission's experiences and the nature of the broadcasting industry, Congress could reasonably conclude that the distress sale policy is an appropriate and limited method of enhancing minorities' ability to acquire established stations without undermining the important goal of stability in the industry and without, as shown below, significantly harming non-minorities.[38] As Chief Justice Burger's opinion in *Fullilove* declared, "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power." 448 U.S. at 480 (citation omitted).[39]

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[37] As noted above (see note 35), the Commission has sought, as part of its overall efforts to promote minority ownership, to make available new allocations of radio and television stations, including new services such as low power television, for which minorities can compete without having to overcome an incumbent licensee's renewal expectancy.

[38] The distress sale policy focuses on existing stations, providing minorities a limited form of access to established broadcasting operations. In this respect, the distress sale policy differs from the comparative preference policy before the Court in *Metro Broadcasting, Inc.* v. *FCC,* No. 89-453, which generally involves applications for new stations.

[39] In addition, Chief Justice Burger noted in *Fullilove* that the set-aside there in issue was "appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or reenactment." 448 U.S. at 489 (footnote omitted). The same can be said of the distress sale program ordered by Congress. When Congress first ordered the FCC to retain the program in 1987, it did so for one fiscal year. Congress has twice ordered the program extended on a yearly basis. See n. 10 above. Con-

C. The Policy's Impact on Nonminorities Is Minimal.

We do not contend that a congressionally-enacted race-conscious program in which a benefit is awarded exclusively on the basis of race could never be found to place an unlawfully heavy burden on nonminorities. The distress sale program, however, does not place an undue burden on nonminorities, either in the individual circumstances of this case or, more generally, from the perspective of all nonminorities interested in entering the broadcast industry.

For example, respondent Shurberg and any other nonminority have three options for acquiring a broadcast station—they can apply for a new station, buy an existing station, or file a competing application against a renewal application of an existing station. See *Minority Task Force Report* at 9-10. The distress sale policy has no effect on applications for new stations or timely filed competing applications that challenge renewals. The policy is operative only where the qualifications of an existing licensee to continue broadcasting have been designated for hearing and no other applications for the station in issue were on file at the Commission at the time of the designation order. See *Clarification of Distress Sale Policy,* 44 Radio Reg.2d (P&F) 479 (1978). Moreover, the decision whether to seek to transfer a station pursuant to the distress sale policy is solely within the discretion of the licensee whose qualifications are at issue in the hearing. There is no requirement that the licensee make such election—it is free to choose to attempt to retain the license and proceed through the hearing, in which case no one—whether minority or non-minority—may compete for the license until issues concerning the incumbent licensee's qualifications have been resolved.

Nor does the distress sale policy involve a "quota" or "set-aside." No particular number or percentage of licenses has been reserved for minorities.[40] In fact, distress sales have represented

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gress can continue to extend the program, eliminate the program, or leave it to the FCC's discretion.

[40] Insofar as the distress sale policy does reserve certain opportunities exclusively for minorities, it goes beyond the type of diversity-based, race-conscious policy that Justice Powell was prepared to accept in *Bakke*. See 438 U.S. at 315-20. The Court's subsequent decision in *Fullilove,* however, upheld a statute under which there was a distinct possibility that nonminorities would have no opportunity to compete for 10% of the funds authorized thereunder. See *Bakke,* 438 U.S. at 378-79 (Brennan, White, Marshall and Blackmun, JJ.) (disagreeing with Justice Powell's view that the Davis Medical School's special admissions plan was fatally defective because it reserved openings exclusively for minorities).

only a tiny fraction of all applications for FCC approval of broadcast station transfers. As Chief Judge Wald observed below, under the distress sale policy, "[a]s in *Fullilove,* nonminority firms remain free to compete for the vast majority of licensee opportunities available" (Pet. App. 106a).[41]

From fiscal years 1979 through 1988, only 38 distress sales were approved by the FCC.[42] Over the same period, the FCC approved approximately 10,000 sales of broadcast stations.[43]

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[41] The policy does involve individualized consideration of each distress sale request. As this case itself illustrates, the FCC entertains, on a variety of grounds, objections to petitions for distress sale authorizations. Moreover, the FCC has made clear that all distress sales would "be scrutinized closely to avoid abuses." *1978 Policy Statement,* 68 F.C.C.2d at 983 (Pet. App. 139a); see also *1982 Policy Statement,* 92 F.C.C.2d at 855 ("[I]n order to avoid 'sham' arrangements, we will continue to review such [partnership] agreements to ensure that complete managerial control over the station's operations is reposed in the minority general partner(s)."). This Court has not held, as Judge Silberman's opinion below suggests, that a program must provide an "opportunity here to ensure that participating minority enterprises have actually been disadvantaged by past discrimination or its effects" (Pet. App. 30a). As Justice O'Connor observed in *Wygant,* "the Court has forged a degree of unanimity; it is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored' . . . ." 476 U.S. at 287.

[42] See Pet. App. 61a, citing *Distress Sales Approved,* FCC Consumer Assistance & Small Business Div. (Oct. 18, 1988).

[43] The Commission actually approved 21,200 assignments or transfers during this period. See Broadcast/Mass Media Application Statistics, Annual Reports of the Federal Communications Commission FY 1979—FY 1988. Agency staff familiar with this area estimate that corporate reorganizations and similar technical changes represent at least one-half of the applications granted. These types of transfers do not constitute "sales" of stations in the common sense of that term.

Thus, during its existence, the minority distress sale policy has accounted for less than four tenths of one per cent of all broadcast station sales; or, conversely, over 99.6 per cent of all broadcast station sales did *not* involve the distress sale policy. Similarly, during the same period, approximately 21,000 license renewal applications were filed, but only 94, or 0.5 per cent were designated for hearing and thus even eligible for disposition pursuant to the distress sale policy.[44] In sum, the distress sale policy operates to foreclose to nonminorities only a minuscule number of opportunities to acquire a broadcast station.

Even in those few cases where a distress sale becomes a possibility because an incumbent licensee finds itself in difficulty before the Commission, nonminorities are not necessarily foreclosed from having the opportunity to acquire the station at issue. If a nonminority (or a minority for that matter) files a competing application before the incumbent licensee's renewal application is designated for hearing, the distress sale option is not available. See page 42 above. Thus, a nonminority can prevent the distress sale policy from ever coming into play. In this case, for example, had respondent Shurberg filed its competing application in a timely manner, before the Commission designated Faith Center's renewal application for hearing, there could have been no distress sale. We note that timely filed competing applications against two of Faith Center's other stations did, in fact, prevent their sale under the distress sale policy. See *Faith Center, Inc.*, 89 F.C.C. 2d 1054 (1982) and 90 F.C.C. 2d 519 (1982).[45]

A comparision of the foregoing statistics with similar information considered in *Fullilove* further demonstrates that the impact of the distress sale policy on nonminorities is not so great as

[44] See Broadcast/Mass Media Application Statistics, Annual Reports of the Federal Communications Commission FY 1979–FY 1988.

[45] Even when the distress sale option is exercised, nonminorities can seek to become limited partners in a minority controlled entity and share in whatever financial benefits arise from operating a broadcast station on that frequency. See *1982 Minority Policy Statement*, 92 F.C.C.2d at 853-855; Pet. App. 108a, Wald, C.J., dissenting. In this case, the minority general partner held a 21 per cent ownership interest in the limited partnership. See Pet. App. 10a.

to make the policy unconstitutional. Chief Justice Burger concluded in *Fullilove* that the burden on nonminority firms was "relatively light" because the percentage of funds available to minorities alone was a minuscule percentage (0.25 per cent) of the amount spent on construction in the United States. 448 U.S. at 484-485 n.72. See also *id.* at 515 (Powell, J.). The impact of the distress sale program is similarly small. Although Congress neither set aside stations for minority ownership nor limited the number of broadcast stations that could be transferred under the distress sale program, Congress could reasonably know from the Commission's experience that there were, on average, fewer than 5 distress sales per year since the inception of the program in an industry currently made up of some 12,000 radio and television licensees.[46] This means that, on average, only about 0.20 per cent of renewal applications filed each year have resulted in distress sales since the policy was begun in 1978.

When a race-conscious policy involves entry into employment, rather than layoffs of established employees, "the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282-283 (Powell, J.); *id.* at 294-295 (White, J.). In this regard, Chief Judge Wald correctly observed below that "the distress sale policy involves entry into a market [and] is far more analogous to 'hirings' than to 'firings.' . . . Because of the unique and unpredictable nature of such situations, a distress sale can hardly be said to disrupt the settled expectations of potential licensees" (Pet. App. 107a).[47] In addition, as Chief Justice Burger stated

[46] There were 13,178 radio and television broadcast stations authorized at the close of fiscal year 1988, of which 11,769 were operating and 1409 were not on the air. Annual Report of the Federal Communications Commission–FY 1988 at 33.

[47] Recent events, in fact, indicate that the only expectation Shurberg could reasonably have had that may have been disrupted by the distress sale policy was the right to participate in a comparative hearing with at least four other parties who also desire to operate the station. That is the number of parties who filed competing applications when the license for this station was due for renewal in 1989. Shurberg did not lose any expectation that it could acquire the station without competition from numerous other parties.

in *Fullilove*, "[i]t is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." 448 U.S. at 484, quoting *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 777 (1976). See also *Wygant*, 476 U.S. at 280-281 (Powell, J.) ("As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1990

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** The Acting Solicitor General has authorized the filing of this brief in order for the Court to have the benefit of the views of the Commission. The views of the United States will be expressed in a brief filed by the Acting Solicitor General.

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